UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLENN ROSE, Appellant vs. FRED R. DICKSON, Appellee	No. 18670

BRIEF OF APPELLEE

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Jurisdiction

The jurisdiction of this Court is conferred by title 28, U.S.C. section 2253.

Statement of the Case

Proceedings in the State Courts

On April 25, 1958, in the Superior Court of Alameda County, a three-count information was filed charging petitioner and appellant,[1/] Glenn Rose, with (1) kidnapping, in violation of section 207 of the California Penal Code; (2) aggravated assault, in vio-

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[1/] Hereinafter referred to as petitioner.

lation of section 245 of the Penal Code; and (3) sex perversion, in violation of section 288a of the Penal Code (CT 1-2[2/]).

On May 8, 1958, petitioner appeared in the Superior Court with his privately retained attorney, Gartner Thomas, Esq., pleaded "not guilty" to each of the three counts, and waived his right to be tried within sixty days from the filing of the information (CT 3).

On June 9, 1958, the matter was called for trial. With the consent of petitioner and on the motion of his attorney, the "not guilty" pleas were withdrawn and petitioner personally entered pleas of "guilty" to the counts charging kidnapping and assault. The third count of the information was thereupon dismissed upon the motion of the district attorney, and the matter was referred to the probation officer (CT 4, RT 1-3[3/]).

On June 30, 1958, at the request of the probation officer, additional time was granted for the preparation of the probation report (RT 3-4).

On July 7, 1958, petitioner's motion for probation came on for hearing. The court at this time

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[2/] "CT" refers to the clerk's transcript on appeal in the state courts, a copy of which was lodged with the District Court.

[3/] "RT" refers to the reporter's transcript on appeal in the state courts, a copy of which was lodged with the District Court.

appointed a psychiatrist to examine petitioner and continued the matter another week, commenting that since the offenses carried such a severe penalty, the court should have the benefit of as much medical information as possible. Petitioner's counsel requested that the court release petitioner on bail. This request was denied (RT 4-6).

On July 16, 1958, the court denied petitioner's motion for probation and sentenced him to state prison on each count, the terms to be served concurrently (CT 4-6, RT 6-10).

On July 21, 1958, petitioner noticed an appeal to the District Court of Appeal (CT 8). On June 8, 1959, that court affirmed petitioner's conviction. People v. Rose, 171 Cal.App.2d 171, 339 P.2d 954. On August 5, 1959, petitioner's application for a hearing of his appeal in the Supreme Court of California was denied.

On September 11, 1959, petitioner's application for a writ of error coram nobis was denied by the Superior Court of Alameda County (Rose v. Dickson, Alameda Superior Court No. 29232).[4/]

[4/] Petitioner subsequently filed seven additional actions in the state courts, seeking to collaterally attack his conviction.

Proceedings in the Federal Courts

Early in October of 1962, petitioner filed an application for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division. On October 15, 1962, the District Court (Honorable Albert C. Wollenberg, Judge) denied the petition for failure to sufficiently allege an exhaustion of state remedies, but on November 14, 1962, after a further showing by petitioner, the order denying petitioner's application was set aside and an order to show cause issued.

After several continuances, the matter was argued on February 11, 1963.[5/] On March 6, 1963, the District Court (the Honorable Stanley A. Weigel, Judge) issued an order denying the petition and discharging the order to show cause. The opinion of the District Court is included in this brief as Appendix "A."

On April 2, 1963, the District Court granted petitioner's application for a certificate of probable cause and leave to appeal in forma pauperis. On April 5, 1963, notice of appeal was filed.

5/ Counsel had been appointed to represent petitioner in the District Court.

Facts

There is no dispute as to the facts in this case, the sole issue being the legal sufficiency of petitioner's allegations coupled with the allegations of his former attorney, Gartner S. Thomas, Esq., to show a prima facie denial of his constitutional rights. In sum, petitioner alleged that he entered a plea of "guilty" to two of the three charges against him because his attorney had advised him that he would be granted probation. Mr. Thomas, petitioner's former attorney, alleged the following in his affidavit: In his original conversations with petitioner, the latter was not inclined to plead guilty because he believed he had a good defense (of some sort, the factual basis or even the nature of any possible defense has never been alleged); that after discussing the case with the investigating officer and the deputy district attorney, he decided that the possibility of probation was so strong that he advised petitioner to plead guilty; that he did not inform petitioner that kidnapping and aggravated assault are punishable by prison terms up to 25 years and 10 years respectively; that petitioner was never told either by himself or by the court that there was a possibility of imprisonment if he did not get probation if he changed

his plea from "not guilty" to "guilty;" and that in his opinion, if petitioner had been told that there was a possibility of a state prison sentence, he would never have changed his plea.

It might be noted that both Mr. Thomas and petitioner's present counsel concede with commendable frankness that there were no assurances from any state officers respecting the granting of probation to petitioner, and that it was the advice of his then attorney, and not the actions of any state officials, which led petitioner to plead guilty.

Petitioner's Contentions

1. Petitioner was denied the effective aid of counsel.

2. The trial court improperly accepted petitioner's plea.

3. This Court should order petitioner's discharge from prison and dismissal of the charges against him.

Summary of Appellee's Argument

1. Petitioner's plea of guilty was freely and voluntarily entered and may not be set aside except upon a showing of improper conduct by state officials.

2. Petitioner was afforded the effective assistance of counsel.

3. Under no circumstances should petitioner be excused from criminal liability on the charges against him, but if a reversal is required, the matter should be remanded to the District Court for an evidentiary hearing on petitioner's allegations.

ARGUMENT

ONE

PETITIONER'S PLEA OF GUILTY WAS FREELY AND VOLUNTARILY ENTERED AND MAY NOT BE SET ASIDE EXCEPT UPON A SHOWING OF IMPROPER CONDUCT BY STATE OFFICIALS.

It bears repeating that petitioner has never alleged that his conviction was brought about by the improper conduct of any state official. In passing upon petitioner's contention that his conviction should be set aside because his expectations of leniency were disappointed, the District Court of Appeal cogently noted:

> "Appellant's contention is based wholly on the claim that he pleaded guilty only on the assurance of his attorney that he 'would positively be given probation.' But assurances of a defendant's own attor-

ney are not sufficient to vitiate a plea of guilty. (In re Atchley, 48 Cal.2d 408, 418 [310 P.2d 15]; People v. Butler, 70 Cal.App.2d 553, 562 [161 P.2d 401].) Such representations can avail a defendant only when there is an apparent corroboration of them by the acts or statements of a responsible state officer. (People v. Gilbert, 25 Cal.2d 422, 443 [154 P.2d 657].) Even if this proceeding be deemed an original application in the nature of coram nobis, and the briefs be considered as affidavits, they fail to show the essential elements of such corroboration." People v. Rose, 171 Cal. App.2d 171, 172; 339 P.2d 954, 955 (1959).

The California rule enunciated by the District Court of Appeal in this case finds its counterpart in that long line of federal cases which squarely hold that a plea of guilty will not be set aside merely because the punishment which is imposed happens to be more severe than the prisoner expected. United States v. Searle, 180 F.2d 209 (7th Cir. 1950); Stidham v. United States, 170 F.2d 294 (8th Cir. 1948); United States v. Sehon Chinn, 74 F. Supp. 189 (S.D.W.Va. 1947), aff'd. per curiam 163 F.2d 876 (4th Cir. 1947); Monroe v. Huff,

145 F.2d 249 (D.C.Cir. 1944); United States v. Colonna, 142 F.2d 210 (3d Cir. 1944); United States ex rel. Wilkins v. Banmiller, 205 F.Supp. 123 (E.D.Pa. 1962).

Petitioner cannot base an argument that he did not intelligently enter a plea of "guilty" on the mere fact that he received a prison sentence instead of probation. The opinion of the United States Court of Appelas for the District of Columbia in Monroe v. Huff, supra, concisely disposes of any such contention. We quote the opinion in full and respectfully urge this Court to follow it.

> "This appeal is from summary denial of a petition for a writ of habeas corpus. Petitioner pleaded guilty to a charge of escaping from custody and is serving a sentence of one to three years. The petition, prepared without the help of counsel, asserts that the attorney who advised the plea was 'incompetent, and disinterested, by advising your petitioner to plead guilty to this charge and not explaining the seriousness of the charge placed against him. He did not, at any time, explain to your petitioner of his constitutional rights, and the said attorney did deprive your petitioner by trick, of a jury trial. Petitioner was

advised to plead guilty of this charge with the understanding that your petitioner would receive a very lenient sentence as he was a personal friend of the Trial Court Justice.' Petitioner's present counsel, appointed by the court, submits that if these statements are true petitioner did not intelligently consent to waive a jury trial and that a hearing should therefore be held to determine the truth of the statement.

"We cannot accept this view. Petitioner knew that he was charged with escaping from custody and that he could choose whether to stand trial or plead guilty. There is nothing to show that he did not profit by his plea, for he might have been given a maximum of five years. But even if he gained nothing by the plea it would not follow that his decision was unwise; and even if it was unwise it would not follow that it was not intelligently made. The substance of his allegations is that he pleaded guilty on the advice of his counsel and received a longer sentence than both hoped. If that were sufficient to show that his plea was not intel-

ligently made few, if any, convictions and sentences on pleas of guilty would be valid. A mere disappointed expectation of great leniency does not vitiate a plea." 145 F. 2d 249.

The record of the proceedings in the Superior Court establish that petitioner personally withdrew his plea of "not guilty" and pleaded "guilty" to the charges against him. When asked whether he wished to withdraw his plea on the first and second counts of the information, petitioner answered in the affirmative and thereupon personally pleaded "guilty" to two of the charges against him,the third one being dismissed on the motion of the district attorney. Thus, it is quite apparent that petitioner knew what he was doing when he withdrew his plea, and he should not be heard to argue now that his conduct was not voluntary or intelligent. The cases relied on by petitioner, i.e., Julian v. United States, 236 F.2d 155 (6th Cir. 1956); United States v. Swaggerty, 218 F.2d 875 (7th Cir. 1955); United States v. Davis, 212 F.2d 264 (7th Cir. 1954); and Fogus v. United States, 34 F.2d 97 (4th Cir. 1929), merely state that the court should see to it that a prisoner who pleads guilty does so freely, voluntarily, intelligently, and personally. The record shows that this was done in the present case. None of the authorities relied on by petitioner can be

construed to hold that a plea of guilty, once entered, may be set aside merely because the prisoner received a sentence more severe than he expected.

TWO

PETITIONER WAS AFFORDED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner contends that his conviction is a denial of due process because he did not have the effective assistance of counsel. The record shows that counsel represented petitioner throughout the proceedings in the Superior Court. Not only did he secure the dismissal of one of the very serious charges pending against petitioner, namely, count 3 of the information, charging a violation of section 288a of the Penal Code,[6/] but he made a strong argument in favor of probation for petitioner on the remaining two counts (RT 6-8).

The general rule applicable to gauging the competency of counsel is this: That unless it is apparent from the face of the record that counsel has not been afforded adequate opportunity to prepare his case or unless his incompetence is so apparent as to require intervention by either the prosecuting attorney or the

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6/ Violation of Penal Code section 288a is punishable by imprisonment up to 15 years or, where force is involved, life imprisonment.

trial court, there has been no denial of effective counsel in the constitutional sense of the term. Petition of Ernst, 294 F.2d 556 (3d Cir. 1961); Application of Hodge, 262 F.2d 778 (9th Cir. 1958; Darcy v. Handy, 203 F.2d 407 (3d Cir. 1953); United States v. Banmiller, 205 F. Supp. 123 (E.D.Pa. 1962).

Petitioner places strong reliance on the recent decision of this Court in Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962). In that case, this Court held that a petition which alleged the incompetency of counsel by reason of his failure to investigate certain defenses, which were alleged in detail in the petition, stated a cause of action for relief on habeas corpus and justified an evidentiary hearing of that petitioner's allegations. Even in Brubaker, the court noted "the ease with which plausible but unfounded allegations may be made against trial counsel, the temptation of the convicted to blame their attorneys rather than themselves, and the weakness of the threat of perjury against those confined in prison," but held that Brubaker's petition "which was prepared and carefully documented by responsible counsel" necessitated an evidentiary hearing. 310 F.2d at 39.

Here, petitioner's application was prepared by himself, and the only factual matters alleged were those contained in the affidavit of Mr. Thomas which was filed

at the hearing on the order to show cause. That very affidavit shows that petitioner received adequate representation. In contrast to the alleged lack of investigation in Brubaker, this case presents a situation where petitioner's former counsel discussed the matter in detail with the investigating officers and the district attorney and, based upon his exploration of the matter, determined that the most advisable course would be to have his client plead guilty to a portion of the charges, secure a dismissal of the rest, and make a motion for probation. Petitioner has never alleged what "good defense" he had to the charges which counsel prevented him from asserting in the trial court, and it is only reasonable to conclude that petitioner had no defense.

Thus, in the absence of specific factual allegations upon which a claim of incompetency could be founded, the only source of inquiry open to the District Court and to this Court is the record of the state court proceedings, and such record does not reveal any incompetency.

THREE

THIS COURT SHOULD NOT ORDER PETITIONER'S DISCHARGE.

Petitioner argues that this Court has the power to remand this case and order petitioner's complete discharge from prison. See title 28, U.S.C. section 2243.

But in the present case, should this Court conclude that petitioner's allegations were sufficient to warrant issuance of the writ, the release of petitioner from prison would not be justified, but rather an evidentiary hearing in the District Court to assess the truth of his allegations would be required. Petitioner by his plea of guilty admitted that he committed two very serious crimes and by his plea petitioner was able to secure the dismissal of a third charge. To order his release outright would be a manifest injustice.

CONCLUSION

We respectfully submit that petitioner has not alleged any reason sufficient to warrant the issuance of a writ of habeas corpus to set aside his conviction. Represented by competent counsel, petitioner freely and voluntarily admitted the commission of two very serious crimes. That he expected to receive probation for these offenses did not make his admission of them any less voluntary. There being no constitutional infirmity in the judgment of conviction, we respectfully submit that the order of the District Court

denying petitioner's application for habeas corpus should be affirmed.

Dated: August 13, 1963.

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Attorneys for Appellee

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

FC
CR SF
62-493

A P P E N D I X "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

GLENN ROSE, Petitioner, vs. FRED R. DICKSON, Respondent.	No. 41056

ORDER DENYING PETITION FOR HABEAS CORPUS AND DISCHARGING ORDER TO SHOW CAUSE

This matter has been submitted on petition for writ of habeas corpus and the return to the order to show cause. Counsel has been appointed to represent petitioner and has filed herein a traverse to the return and a supplemental memorandum of points and authorities. It is the conclusion of this court that, assuming the allegations of the petition to be true, petitioner is not entitled to the relief sought.

Petitioner pleaded guilty to kidnapping (California Penal Code §207) and aggravated assault (California Penal Code § 245) and was sentenced to serve one to twenty-five years in prison, with the sentences on the two offenses to run concurrently.

The gist of petitioner's first contention is that

his trial attorney did not discuss with him possible defenses to the charges, that the attorney did not tell him that the maximum possible penalty was imprisonment for 35 years, but advised him that he would be granted probation as a result of his guilty plea.

There is a claim that petitioner "was represented by unknown, unappointed, incompetent counsel" (p. 3 of petition for rehearing). At another point, he denies having retained the attorney. (p. 2 of original petition) and at another, that the attorney "self appointed himself counsel of record" (p. 8 of original petition). However, the record shows that this attorney appeared on petitioner's behalf throughout the proceedings in the trial court and on appeal to the District Court of Appeal. [That court described the attorney as "counsel of his (petitioner's) own choice." People v. Rose, 171 C.A.2d 171; 339 P.2d 954 (1959).] Furthermore, the reporter's transcript of the proceedings on five different days in the trial court shows no indication by petitioner that the attorney was not authorized to represent him. Therefore, any contention here that the attorney was not authorized by petitioner to represent him is patently without merit. Barber v. United States, 227 F.2d 431 (10th Cir., 1955). Whether he was retained by petitioner or appointed by the court makes no difference to the outcome of this matter. Compare Application of Hodge, 262 F.2d 778 (9th Cir., 1958)

with Taylor v. United States, 238 F.2d 409 (9th Cir., 1956).

No denial of due process is shown by the fact that a defendant pleaded guilty on the advice of his attorney although the defendant was not aware of the maximum penalty that could be imposed. United States v. Searle, 180 F. 2d 209 (7th Cir., 1950). Similarly, a plea of guilty is not invalid where defendant was not informed of possible defenses by his attorney. United States v. Sturm, 180 F.2d 413 (7th Cir., 1950). (It appears from the affidavit of the trial attorney that petitioner originally pleaded not guilty because he believed he had a good defense.) Nor is the expectation of lenience, which is later proved to be unfounded, sufficient to invalidate a guilty plea and conviction, even though the plea was the result of erroneous information supplied by the defendant's attorney. United States v. Sehon Chinn, 74 F.Supp. 189 (S.D. W.Va., 1947), affirmed per curiam, 163 F.2d 876 (4th Cir., 1947); Monroe v. Huff, 145 F.2d 249 (D.C.Cir., 1944); United States ex rel. Wilkins v. Banmiller, 205 F.Supp. 123 (E.D. Pa., 1962); see also United States v. Parrino, 212 F.2d 919 (2d Cir., 1954), in which the court held that the fact that counsel assured the defendant that a guilty plea would not have the effect of subjecting him to deportation, such advice being erroneous, would not present such injustice as to require vacation of the judgment and withdrawal of the plea.

The facts alleged here, if proved, would not be sufficient to show a denial of the right to effective counsel, assuming that the federal constitution provides such a right in this case. Counsel's representation was not "such as to make the trial a farce and a mockery of justice." Taylor v. United States, supra, p. 414, quoting from United States v. Pisciotta, 199 F.2d 603 (2d Cir., 1952). Allegations of mere mistakes and errors of counsel, or that counsel was incompetent, are not sufficient. Taylor v. United States, supra.

Furthermore, the action of the attorney was not state action within the meaning of the 14th Amendment to the United States Constitution. There is nothing to show that any representative of the state knew of or was responsible for the advice of the attorney upon which petitioner relied. Nor had the trial court any reason to suspect the ability and loyalty of counsel. Application of Hodge, supra.

Cases cited by petitioner do not support his position. In Fogus v. United States, 34 F.2d 97 (4th Cir., 1929), there was a claim that the plea of guilty had been induced by misrepresentations as to possible punishment by the United States Marshal; in Machibroda v. United States, 368 U.S. 487 (1962), it was the United States Attorney; in Smith v. O'Grady, 312 U.S. 329 (1941), it was the district attorney. The ruling in Kercheval v. United States, 274 U.S. 220 (1927) was that a plea of guilty withdrawn by leave of the court

is not admissible in evidence at the trial. The court in United States v. Davis, 212 F.2d 264 (7th Cir., 1954) reversed for a hearing because the record did not conclusively show that the defendant understood the nature of the charges. There is no indication that this was so in this case. Julian v. United States, 236 F.2d 155 (6th Cir., 1956) is to the same effect. In United States v. Swaggerty, 218 F.2d 875 (7th Cir., 1955), the court affirmed the denial of the motion to vacate the judgment, on the grounds that no denial of a fundamental right was shown and that no manifest injustice was shown. One of the factors leading to this decision was that the defendant was aware of the possible penalties when he pleaded guilty. The court did not suggest that it was laying down a constitutional rule or suggest that in the absence of that factor it would have reversed. The cases cited hereinabove show that lack of knowledge of the possible penalties is not sufficient to invalidate a plea of guilty, under the circumstances of this case.

Petitioner's second contention is that he was denied due process of law because the offense of kidnapping, charged in the information, was not charged in the commitment order or related to the offense charged therein. The information charges that the three offenses "were connected together in their commission". (Clerk's Transcript on Appeal, p. 2). Under California law, the offense of kidnapping was therefore properly included. People v. Downer,

37 C.2d 800; 22 Cal. Rptr. 347 (1962). Furthermore, under California law, failure to move the trial court to set aside the information constitutes a waiver of any possible objections that might be made to it. Schlette v. People of the State of California, 284 F.2d 827 (9th Cir., 1960); People v. Rankin, 169 C.A.2d 150; 337 P.2d 182 (1959). There is no federal question presented in such a case unless the irregularities alleged to have been committed under the state practice are so flagrant as to amount to a violation of due process. Application of Lyda, 154 F.Supp. 237 (N.D. Cal. N.D., 1957). The due process requirement is satisfied since it is not suggested that the petitioner was denied sufficient notice of the accusation and an adequate opportunity to defend himself. Garland v. Washington, 232 U.S. 642 (1914); Paterno v. Lyons, 334 U.S. 314 (1948). Nor could such a suggestion successfully be made in view of the following facts disclosed by the record: The information was filed on April 25, 1958; on May 8, 1958, petitioner pleaded not guilty to the three counts charged; on June 9, 1958, he withdrew his plea of not guilty, was rearraigned and pleaded guilty to kidnapping and aggravated assault; at that time the third count of the information was dismissed on motion of the district attorney; no objection to the procedure followed was raised at any time up to and including the appeal.

As to the contention that the conviction is invalid because the corpus delicti of the offenses was not

shown, the guilty plea established all elements of the crime, and nothing needed to be proved. People v. Jones, 52 C.2d 636; 343 P.2d 577 (1959). No federal question is presented by that contention.

All other contentions based on defects in the pleadings and procedure prior to the plea are subject to the same conclusion as the contention regarding the information itself. See cases cited above.

Accordingly, the petition for writ of habeas corpus is denied and the order to show cause is discharged.

Dated: March 6, 1963.

Stanley A. Weigel
Judge